

**BEFORE THE
GOVERNING BOARD
OF THE ANAHEIM CITY SCHOOL DISTRICT**

In the Matter of the Accusation Against:

OAH Case No. 2011030412

Certificated Employees of the Anaheim City
School District,

Respondents.

PROPOSED DECISION

Humberto Flores, Administrative Law Judge with the Office of Administrative Hearings, heard this matter on April 25, 2011, in Anaheim, California.

Cathie L. Fields, Attorney at Law, represented the Anaheim City School District (District).

Carlos Perez, Attorney at Law, represented all Respondents set forth in the "List of Certificated Employees Represented by Reich, Adell & Cvitan (exhibit A)."

Evidence was introduced at the hearing and the matter was submitted on April 25, 2011.

FACTUAL FINDINGS

1. Jim Elsasser, Assistant Superintendent of Human Resources, made and filed the Accusation in his official capacity.

2. Respondents are certificated employees of the District.

3. On or about March 7, 2011, by resolution number 2010-11/29 (resolution), the Board adopted the Superintendent's recommendation to reduce or discontinue particular kinds of services provided by the District, effective the 2011-2012 school year.

4. The resolution included a listing by type and full-time equivalent (FTE) of those positions (95.98 FTE) which the Board resolved to reduce or eliminate as follows:

Elementary Classroom Instruction

27.5 FTE

Psychologists	1.0 FTE
Teachers currently serving under temporary contracts in categorically funded positions	62.58 FTE
Nurses currently serving under temporary contracts in categorically funded positions	4.50 FTE
Speech and Language Pathologists currently serving under temporary contracts in categorically funded positions	.40 FTE
TOTAL	95.98 FTE

5. Board resolution 2010-11/29 also included a list and description of the criteria used by the District to determine the order of termination of certificated employees who first rendered paid service with the District on the same date. The Board also adopted resolution number 2010-11/30 directing the superintendent to give “Notice of Non-reelection” to temporary certificated employees.

6. On or about March 10, 2011, Jose Banda, Superintendent of the District, served written notice on Respondents that they would not be re-employed in the ensuing school year. Respondents filed timely requests for hearing.

7. On March 22, 2011, Assistant Superintendent Elsasser filed and served respondents with an Accusation, Notice of Defense, Notice of Hearing, and related materials. The Accusation and related materials served on each Respondent included the Notice of Hearing, which noticed the instant hearing. The Accusation included a form, that if signed and returned by a date certain would constitute a Notice of Defense.

8. The recommendation to layoff Respondents from employment was not related to their professionalism and dedication as teachers.

9. The District identified the certificated employees providing the particular kinds of services that the Board directed to be reduced or discontinued.

10. The services at issue were “particular kinds of services” that could be reduced or discontinued within the meaning of Education Code section 44955. The Board’s decision to reduce or discontinue these particular kinds of services was not arbitrary or capricious, but constituted a proper exercise of discretion.

11. The reduction or discontinuation of particular kinds of services related to the welfare of the District and its pupils. The reduction or discontinuation of particular kinds of services was necessary to decrease the number of certificated employees of District, as determined by the Board because of a budget shortfall.

12. The Board considered all known attrition, including resignations, retirements, and requests for transfer, in determining the actual number of necessary layoff notices to be delivered to its employees.

13. In cases where individual Respondents shared a first date of paid service, the District was required to apply the tie-breaker criteria approved by the Board. The Board's resolution number 2010-11/29 established tie-breaker criteria that were fair and reasonable, and the District applied those tie-breaker criteria fairly and appropriately.

14. The District had decided to "skip" certificated employees who teach in the dual immersion program, and who would otherwise be subject to layoff. Certificated employees who teach dual immersion classes are required to have a BCLAD credential. The District also determined that Respondent Jenny Rodriguez and Sandra Mullen, who hold BCLAD credentials, would bump into the positions held by Tatiana Alegria and Respondent Maria Cortes-Degante, both of whom received preliminary notices. Ms. Alegria and Respondent Cortes-Degante currently teach dual immersion classes. At the hearing, the District indicated that the dual immersion program is expected to increase by two classes, therefore, Ms. Alegria, Ms. Mullen, and Respondents Maria Cortes-Degante and Jenny Rodriguez would no longer be subject to layoff.

15. No junior certificated employee been retained to perform services that a more senior employee is certificated and competent to render.

CERTIFICATED EMPLOYEES IN CATEGORICALLY FUNDED POSITIONS

16. The certificated employees who were served with the Accusation and related materials were identified as Respondents. (See exhibit 6) However, the District contends that the temporary employees listed in exhibit 6 and identified as "Precautionary Respondents," were served with jurisdictional documents and allowed to participate in this proceeding as a precaution only. These temporary employees were hired to fill categorically funded positions, pursuant to Education Code section 44909. Other temporary employees hired as replacements for teachers on leaves of absence pursuant to Education Code section 44920 were not served with precautionary layoff notices.

17. The District asserted that the temporary employees are not entitled to participate in this proceeding. Categorically funded Respondents employed pursuant to Education Code section 44909 are temporary employees who can be dismissed without the requirement of this hearing. (*Zalac v. Ferndale Unified School District* (2002) 98 Cal.App. 4th 838, 840-841); *Bakersfield Elementary Teachers Association v. Bakersfield City School District* (2006) 145 Cal.App.4th 1260). Education Code section 44954 provides the District with authority to release temporary employees. The District is nevertheless requesting an order in conformance with its position that it may non-re-elect these temporary employees independently from the instant process meant for probationary and permanent employees. This request is denied because the undersigned has no jurisdiction to order the layoff of employees beyond the authority provided under Education Code sections 44949 and 44955.

18. Based on Factual Findings 16 and 17, the administrative law judge will not make any legal conclusions or issue any order relating to the termination of certificated employees currently employed by the District in categorically funded positions.

LEGAL CONCLUSIONS

1. The parties met all notice and jurisdictional requirements set forth in Education Code sections 44949 and 44955.

2. Cause exists to sustain the District's action to reduce or discontinue particular kinds of services, as set forth in resolution number 2011-10/29 for the 2011-2012 school year, pursuant to Education Code sections 44949 and 44955, as set forth in Factual Findings 1-15, and Legal Conclusions 1, and 3-9.

3. Education Code section 44955 states, in pertinent part:

[¶] . . . [¶]

(b) Whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or . . . when in the opinion of the governing board of the district it shall have become necessary by reason of any of these conditions to decrease the number of permanent employees in the district, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees of the district, permanent as well as probationary, at the close of the school year. Except as otherwise provided by statute, the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render.

[¶] . . . [¶]

(c) Notice of such termination of services shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed.

The governing board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render.

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4. Education Code section 44949 states, in pertinent part:

(a) No later than March 15 and before an employee is given notice by the governing board that his or her services will not be required for the ensuing year for the reasons specified in Section 44955, the governing board and the employee shall be given written notice by the superintendent of the district or his or her designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that the notice be given to the employee, and stating the reasons therefor.

[¶] . . . [¶]

(b) The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year.

(c) In the event a hearing is requested by the employee, the proceeding shall be conducted and a decision made in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code and the governing board shall have all the power granted to an agency therein, except that all of the following shall apply:

[¶] . . . [¶]

(3) The hearing shall be conducted by an administrative law judge who shall prepare a proposed decision, containing findings of fact and a determination as to whether the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof. The proposed decision shall be prepared for the governing board and shall contain a determination as to the sufficiency of the cause and a recommendation as to disposition. However, the governing board shall make the final determination as to the sufficiency of the cause and disposition.

5. The services identified in the Board's resolution are particular kinds of services that the Board can reduce or discontinue under Education Code section 44955. The Board's decision to reduce or discontinue the identified services was not arbitrary or capricious, and was a proper exercise of its discretion. Cause for the reduction or discontinuation of services relates solely to the welfare of the District's schools and pupils within the meaning of Education Code section 44949.

6. The District identified the certificated employees providing the particular kinds of services that the Board directed to be reduced or discontinued.

7. A school district may reduce services within the meaning of Education Code section 44955, subdivision (b), “either by determining that a certain type of service to students shall not, thereafter, be performed at all by anyone, or it may ‘reduce services’ by determining that proffered services shall be reduced in extent because fewer employees are made available to deal with the pupils involved.” (*Rutherford v. Board of Trustees* (1976) 64 Cal.App.3d 167, 178-179.)

8. The District established cause to layoff the Respondents listed in exhibit 6, who have been identified as probationary or permanent employees.

9. No junior certificated employee is being retained to perform services that a more senior employee is certificated and competent to render.

10. Cause exists to exempt Respondents Maria Cortes-Degante and Jenny Rodriguez, and certificated employees Tatiana Alegria and Sandra Mullen from the list of certificated employees subject to layoff for the ensuing school year, based on Factual Finding 14.

ORDER

1. Notice may be given to Respondents listed in exhibit 6, who have been identified as probationary and permanent employees, that their services will be not be required of the 2011-2012 school year. Notice shall be given in inverse order of seniority.

2. The District may exempt Respondents Maria Cortes-Degante and Jenny Rodriguez, and certificated employees Tatiana Alegria and Sandra Mullen from the list of certificated employees subject to layoff.

Dated: April 29, 2011

HUMBERTO FLORES
Administrative Law Judge
Office of Administrative Hearings